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No. 03-814

In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel?"

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA").[1] The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 531,000 working men and women. Many of those men and women are employed upon the navigable waters of the United States as commercial divers, diver tenders, pile drivers, carpenters, riggers, and welders. They build, repair and demolish piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They typically perform these tasks from the decks of crane ships, drilling ships, tug boats, dive boats, derrick barges, spud barges, dredges, mud scows, jack-up rigs, work-over rigs and other special purpose watercraft. Such work often invests the people who perform it with seaman status under the Jones Act. 46 U.S.C.A. § 688. That status, in turn, gives many UBCJA members access to a "trilogy of heightened legal protections."[2] The UBCJA is interested in this case because the Court's decision will affect its members' rights to claim these protections.

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[1] This brief was prepared on behalf of the UBCJA by its undersigned counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the UBCJA, or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] Often called the "seaman's remedial trident," these remedies include the rights to sue for Jones Act negligence, unseaworthiness and maintenance, cure and found. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1997).

SUMMARY OF ARGUMENT

Dredge hands have always been treated as seamen by the maritime law[3] and dredges have always been treated as vessels.[4] We cannot find a single reported case holding that a dredge is not a vessel – except for the decision below.[5] That decision is based on the First Circuit's ruling

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[3] *See, e.g., Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143 (3d Cir. 1998); *Williams v. Western Pacific Dredging Co.*, 441 F.2d 65 (9th Cir. 1971); *Gahagan Const. Corp. v. Aramao*, 165 F.2d 301 (2nd Cir. 1948); *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C. Ha. 1982); *Melanson v. Bay State Dredging & Contracting Co.*, 62 F.Supp. 482 (D.C. Mass. 1945). As the Fourth Circuit explained more than 100 years ago, when it upheld seaman's rights for a Virginia dredge hand in *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896), "in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.'" *Id.*

[4] The first reported case to treat a dredge as a vessel under maritime law was *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886). By 1930, so many courts had followed suit, the Fourth Circuit could correctly note that the vessel status of dredges "is sustained by the overwhelming weight of authority." *Butler v. Ellis*, 45 F.2d 951, 955 (4th Cir. 1930).

[5] In a recent A.L.R. Annotation entitled *Applicability of Jones Act (46 U.S.C. § 688) to Workers Connected with Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. Fed. 733 (1989 & 2004 Supp.), the author, John R. Wagner, Jr., cites many published opinions treating dredges as Jones Act vessels, *see id.* at § 3(a), and seven that do not. *Id.* at § 3(b). One of those seven is the decision below. But a close examination of the other six shows that Mr. Wagner is misreading them. Many, if not all of these cases, are no longer good law. Most of them turned on jurisdictional issues, but not one them on vessel status.

The first of Mr. Wagner's cases, *Fuentes v. Gulf Coast Dredging Co.*, 54 F.2d 69 (5th Cir. 1931), involved a plaintiff who was hurt working on a dredge that lay partially aground at the end of a channel it had dug

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off Galveston Bay. The district court denied his Jones Act claim on the merits, and the Fifth Circuit affirmed, ruling *sua sponte* that the district court had lacked subject matter jurisdiction because the tort had occurred on a dredge doing landfill work in marginally navigable water. *But see O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943) (holding that the Jones Act covers any injury that occurs in the course of a seaman's employment and not just those that occur afloat). Assuming *arguendo* that *Fuentes* was sound, it did not hold, state, or even fairly imply that the dredge was not a vessel.

Woods v. Merrill-Stevens Dry Dock & Repair Co., 14 F.Supp. 208, 209-10 (S.D.Fla. 1936) expressly followed *Fuentes* in holding that dredge work at a shipyard was too "purely local" to fall under the federal courts' admiralty jurisdiction. It did not consider vessel status either.

Stanfield v. Shellmaker, Inc., 869 F.2d 521 (9th Cir. 1989) upheld the district court's denial of Jones Act damages to a plaintiff who had been injured aboard a dredge that was deepening a land-locked, irrigation channel lying wholly within the State of California. The decision was handed down six years before this Court's lodestar decision in *Chandris*, and concluded that the land-locked situs of the project in question precluded a finding of seaman status at the time of injury, even though the plaintiff had been employed by the defendant for a number of years, aboard several different dredges, on a variety of other projects, all of which had occurred on navigable waters, because the "fleet seaman doctrine" neither obtained in the Ninth Circuit nor encompassed an injury "arising from service to a *vessel* in non-navigable waters." 869 F.2d at 525 (emphasis added); *but see Chandris*, 515 U.S. at 363 (holding that courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury"). There is thus nothing in the decision to suggest that a dredge is not a vessel.

The watercraft involved in *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990), was not a dredge at all but "a spud barge" being used as a commercial diving platform. *But see Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 351 (5th Cir. 1998) (holding that "special purpose craft such as submersible drilling rigs, jack-up rigs, and *spud barges* remain stationary while performing work, yet retain their vessel status.") (emphasis added).

The court in *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F.2d 608, 610 (CA D.C. 1942), excluded the plaintiff dredgerman from Jones Act

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in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (*en banc*), and is manifestly erroneous. Rather than belabor it any further, or dwell on the particular status of the *Super Scoop,* we have attached a Chronological Table cataloguing the long and hitherto unbroken line of cases holding or assuming that a dredge is a vessel. *Appendix A hereto.* We will devote the remainder of this brief to the much broader, and far more important question posed by the Petition for *Certiorari*: What is the legal standard for determining whether a special purpose watercraft is a vessel?

Congress and the circuit courts have offered different answers to that question. The Congressional standard is codified in the Rules of Construction Act. 1 U.S.C. §§ 1 *et seq.*; 61 Stat. 633, ch. 388. Those rules were adopted to assist "in determining the meaning of any Act of Congress," 1 U.S.C. § 1, and provide that: "The term 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This is not only the

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coverage on the view – later "jettison[ed]" by this Court in *McDermott, Int. v. Wilander*, 498 U.S. 331, 353 (1991) – that a seaman's duties must "pertain to navigation". Although it expressed doubt about the proposition that mining sand from a navigable river bank should be considered maritime, 128 F.2d at 610; *but see Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527, 540 (1995) (" 'There are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters is subject to maritime jurisdiction . . .' "), the *Beddoo* decision never questioned the vessel status of the dredge involved.

The decision in *Covington v. Standard Dredging Corp.*, 61 So.2d 644, 645 (Fla. 1952), refers to a dredge doing landfill work as a "vessel" while excluding the worker from seaman status on the same mistaken ground as *Beddoo, supra.*

"most widely used" definition of the term, 1 Schoenbaum, *Admiralty & Maritime Law* § 6-9 (4th ed. 2003), it has already been utilized by this Court in a variety of contexts.[6] Since "[m]aritime tort law is dominated by statute," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), the UBCJA agrees with Petitioner Stewart that 1 U.S.C. § 3 supplies the best legal standard for determining the vessel status of special purpose watercraft under the Jones Act.

Lower courts continued to use 1 U.S.C. § 3 for determining Jones Act vessel status right into the 1980's.[7] Since that section merely requires that a vessel be "*practically* capable of being used as a means of transportation", *Evansville*, 271 U.S. at 19 (emphasis added), experienced admiralty courts like the Fifth Circuit left Jones Act status open to a whole armada of "special purpose structures not usually employed as a means of transportation" and entrusted close cases to the jury. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).[8] As Judge Wisdom's landmark decision in *Offshore* summed up:

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[6] *See Norton v. Warner Co.*, 321 U.S. 565, 571 n. 4 (1944); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926); *Ellis v. United States*, 206 U.S. 246 (1907); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1885).

[7] *See, e.g., Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982) (river barge); *Brinegar v. San Ore Constr. Co.*, 302 F.Supp. 630 (E.D.Ark. 1969) (dredge); *Early v. American Dredging Co.*, 101 F.Supp. 393 (E.D.Pa. 1951) (dredge); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948) (dredge); *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (5th Cir. 1938) (dredge); *Kibadeaux v. Standard Dredging Co.*, 81 F.2d 670 (5th Cir. 1936) (dredge); *George Leary Const. Co. v. Matson*, 272 F. 461 (4th Cir. 1921) (pile driver scow).

[8] *See also Blanchard v. Engine & Gas Compressor Services, Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978); *Hicks v. Ocean Drilling and*

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> Attempts to fix unvarying meanings having a firm legal significance to such terms as 'seaman,' 'vessel,' 'member of the crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application under the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial court cannot state an unvarying rule of law that fits the facts.

266 F.2d at 779-80.

This Court expressly approved *Offshore* in 1991 when it "jettisoned" the requirement that a Jones Act plaintiff be aboard "primarily to aid in navigation," and made all those who "'contribut[e] to the function of the vessel or to the accomplishment of its mission'" eligible for seaman status. *Wilander, supra,* 498 U.S. at 354-55 *quoting Robison,* 266 F.2d at 779. By then, however, some of the lower courts had forgotten Judge Wisdom's teaching. Beginning with *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001-02 (5th Cir. 1973), even the Fifth Circuit started deciding close cases as a matter of law because of a subtle distinction it had come to perceive between watercraft that were "designed or used primarily for the transportation of passengers, equipment and cargo," and those whose transportation function was only "incidental." *Bernard v.*

Exploration Co., 512 F.2d 817 (5th Cir. 1975), *cert denied*, 423 U.S. 1050 (1976).

Binnings Constr. Co., 741 F.2d 824, 828-29 (5th Cir. 1984). This distinction gradually swamped the broad language in 1 U.S.C. § 3, and led first to the so-called "floating work platform" doctrine espoused to varying degrees by the Fifth, Eleventh and Second Circuits,[9] and ultimately to the First Circuit's radical departure in *DiGiovanni*.[10] According to *DiGiovanni*, and the decision below, "if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." 959 F.2d at 1123 (original emphasis). This capricious rule builds on *Bernard* and the work platform doctrine, *id.*, and permits maritime workers like Petitioner Stewart to oscillate in and out of Jones Act coverage in the course of their regular duties.

But as the Fifth Circuit eventually concluded in *Manuel v. P.A.W. Drilling Well Service, Inc.*, 135 F.3d 344, 347-50 (5th Cir. 1998),[11] the work platform doctrine was

[9] *See, e.g., Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures*, 896 F.2d 504 (11th Cir. 1990); *Tonnensen v. Yonkers Contracting Co.*, 82 F.3d 30 (2nd Cir. 1996).

[10] *DiGiovanni*, 959 F.2d at 1123 (original emphasis). This rule is even more restrictive than the work platform doctrine, 959 F.2d at 1128 (Torruella, J., dissenting), and has been adopted by both the Sixth Circuit, *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547-48 (6th Cir. 1994), and the California Court of Appeal. *See, Spears v. Kajima Eng. & Const. Co.*, 101 Cal.App.4th 466, 475, 124 Cal.Rptr.2d 97 (2002); *Gault v. Modern Continental/Roadway Const. Co., Inc. J.V.*, 100 Cal.App.4th 991, 1005, 123 Cal. Rptr. 2d 85 (2002). It is also the basis for the decision below. *Stewart v. Dutra Const. Co., Inc. ("Stewart I")*, 230 F.3d 461, 467 (1st Cir. 2000), *Pet. App. B*, 22.

[11] The plaintiff in *Manuel* was an oil field hand injured aboard a spud barge anchored over an abandoned well head. The trial court had relied on the work platform doctrine to dismiss his Jones Act claims on

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formulated during the 1980's, before this Court's decision in *Wilander*, and more specifically, before this Court had affirmed the putative seaman status of a San Diego shipyard worker injured aboard "a floating work platform" in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). For its part, *DiGiovanni* was decided in 1992, three years before this Court handed down *Chandris*. Between them, *Wilander, Gizoni*, and *Chandris* resurrected Judge Wisdom's opinion in *Offshore, see, Wilander*, 498 U.S. at 353, emphasized that it is the plaintiff's connection to a vessel and not his or her particular job that is determinative, *Gizoni*, 502 U.S. at 88, rejected a "snapshot" or "moment of the injury" test in favor of a scrolling inquiry assessing the "total circumstances" of the plaintiff's overall employment, *Chandris,* 515 U.S. at 363, and handed down the "essential requirements" for seaman status:

> "First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. . . .
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of

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the ground that his spud barge was not a vessel. The Fifth Circuit reversed and questioned the continued vitality of the work platform doctrine after noting that "many of our work platform cases were decided before the Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*, where the Court concluded that genuine issues of material fact existed 'regarding whether the floating platforms [upon which plaintiff Gizoni had worked] were vessels in navigation.'" *Id.* at 350, n. 8 (*quoting Gizoni*, 502 U.S. at 92). As the decision observed, "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status." *Id.* at 351.

> such vessels) that is substantial in terms of both its duration and its nature.'" *Id.* at 368.

In retrospect, it is obvious that both *DiGiovanni* and the work platform doctrine were fledgling, unsuccessful, and in the end unnecessary attempts to restrict Jones Act coverage to sea-based workers who "'face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.'" 959 F.2d at 1122 *quoting Wilander,* 498 U.S. at 354. Now that this Court has handed down the substantial connection requirement to accomplish this very same goal, *Chandris,* 515 U.S. at 368, there is no longer any need for such restrictive vessel definitions. Many lower courts recognized, from the outset, that there never was.

Unlike the courts following *DiGiovanni*, or the work platform doctrine, the Ninth Circuit holds "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Southwest Marine, Inc. v. Gizoni ("Gizoni II")*, 56 F.3d 1139, 1140, n. 1 (9th Cir. 1995). That Circuit still leaves close questions to a jury, *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1136-37 (9th Cir. 2002), and only denies vessel status to watercraft that have no transportation function of any kind. *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660-61 (9th Cir. 1992). The Third, Fourth and Seventh Circuits have taken a similar tack.[12]

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[12] *See, e.g., Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984). ("Any floating structure, including those designed for special purposes, is a 'vessel' . . . so long as the structure at some time serves as a means of transportation on water."); *Hill v. Diamond*, 311 F.2d 789, 791 (4th Cir. 1962) ("It is well established that many special purpose craft, such as dredges, floating derricks and

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This ecumenical approach to vessel status not only fits the doctrinal framework established in *Wilander* and *Chandris* by leaving the winnowing process to the substantial connection requirement, it preserves the uniformity of maritime law by conforming to the statutory rule of construction codified in 1 U.S.C. § 3. It also sidesteps the vague distinction between a watercraft's "primary" and "incidental" purposes and holds to the course set in *Chandris* by eschewing "the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves." 520 U.S. at 369. We respectfully submit that none of the special purpose vessel standards on which Dutra and its *amici* will rely can claim any of these advantages. For these reasons, the UBCJA supports Petitioner's reliance on 1 U.S.C. § 3.

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barges equipped for special purposes or operations are vessels within the meaning of the Jones Act[.]"); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975) (upholding Jones Act vessel status for a dumb barge because "the Supreme Court has extended that remedy so as to permit claims brought for injuries incurred in the construction of a "Texas Tower," *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), and an off-shore oil rig, *Gianfala v. Texas Co.*, 350 U.S. 879 (1955).").

ARGUMENT

I. JONES ACT JURISPRUDENCE NEEDS A UNIFORM VESSEL DEFINITION

A. 33 U.S.C. § 902(3)(G) makes an employment related connection to a vessel *the* essential element of seaman status.

Although the Jones Act neither uses nor defines the term "vessel," the LHWCA does.[13] That statute specifically excludes "a master or a member of a crew of any vessel" from its protection. 33 U.S.C. § 902(3)(G). Since that phrase was designed to bar Jones Act beneficiaries from LHWCA benefits, it is not only synonymous with the term "seaman," it codifies "the key requirement for Jones Act coverage[.]" *Wilander,* 498 U.S. at 347; *Swanson v. Marra Bros., Inc.,* 328 U.S. 1, 6-7 (1946). It is therefore thoroughly settled that a Jones Act plaintiff must have an "employment-related connection to a vessel in navigation." *Chandris,* 515 U.S. at 357. Defining the term "vessel" thus remains the last, "pivotal issue" in this labyrinthine corner of the law. *See, Stewart I,* 230 F.3d at 466, *Pet. App. B,* 21.[14]

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[13] Unfortunately, the circular vessel definition set forth in the LHWCA sheds no light on the seaman status question. According to that definition, "the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21).

[14] This Court handed down four Jones Act decisions between 1990 and 1997. *Wilander, supra*; *Gizoni, supra, Chandris, supra*; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997). But those cases did not present an opportunity to address the question of vessel status. *See gen.*

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B. The lower courts have not been able to agree on a vessel definition.

The lower courts have developed a gaggle of conflicting vessel definitions.[15] The only point on which they seem to agree is their unanimous assertion that: "The LHWCA definition of 'vessel' is significantly more inclusive than that under the Jones Act." *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996) (*en banc*).[16] While the cases that make this assertion are not construing the crew member exclusion in § 902(3)(G), but the third party liability provisions in § 905(b),[17] the notion that the word "vessel" means one thing in the former and another in the latter offends the "presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Because most lower courts employ the rule of construction in 1 U.S.C. § 3 to determine whether a floating structure is a "vessel" under LHWCA § 905(b), *Morehead, supra*,[18] and since this Court

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John R. Hillsman, *Still Lost in the Labyrinth: The Continuing Puzzle of Seaman Status*, 15 U.S.F. Mar. L.J. 49, 54 (2003).

[15] *See* Petition for Certiorari, § I.

[16] *See also Stewart v. Dutra Const. Co. ("Stewart II")*, 343 F.3d 10, 13 (1st Cir. 2003), *Pet. App. A*, 5; *Kathriner*, 975 F.3d at 662; *DiGiovanni v. Traylor Bros. ("DiGiovanni III")*, 97 F.3d 624 (1st Cir. 1996); *McCarthy v. Bark Peking*, 716 F.2d 130, 133-34, n. 3 (1st Cir. 1983); *Sala v. Gates Constr. Corp.*, 868 F.Supp. 474, 479 (E.D.N.Y. 1994); *DiGiovanni v. Traylor Bros. ("DiGiovanni II")*, 830 F.Supp. 106, 108-109 (D.R.I. 1993).

[17] That section permits LHWCA beneficiaries to seek third party tort damages for injuries caused by "the negligence of a vessel[.]" 33 U.S.C. § 905(b); *see gen. Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

[18] *See also McCarthy*, 716 F.2d at 33-34; *Kathriner*, 975 F.2d at 662; *DiGiovanni II*, 830 F.Supp. at 108-109.

has already used that same section to interpret LHWCA § 902(3)(G), *Norton*, 321 U.S. at 571 n. 4, it is difficult to understand why that rule should not be universally applied.

II. 1 U.S.C. § 3 PROVIDES THE ONLY WORKABLE STANDARD FOR DETERMINING SPECIAL PURPOSE VESSEL STATUS.

A. Until recently, the admiralty had always accommodated special purpose vessels.

As this Court recognized in *Wilander*, the purposes for which vessels are employed upon the waters are "myriad." 498 U.S. at 344. The maritime law was therefore evolving to accommodate unconventional watercraft long before Judge Wisdom articulated his version of the special purpose doctrine in *Robison*. As the Fourth Circuit observed in *Saylor v. Taylor*[19] back in 1896, "so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world." 77 F. at 479.[20] This has "enabled the law to develop naturally along with the development of unconventional vessels[.]" *Offshore*, 266 F.2d at 780. The rule of construction codified in 1 U.S.C. § 3 can be seen as a reflection of that long standing policy. *See*, Steven F.

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[19] *See* footnote 3 *supra*.

[20] *See also* Hon. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1375 (2001); E. Benedict, *American Admiralty Law* § 241 (1850).

Friedell, 1 *Benedict on Admiralty* § 165 (7th ed. 1958 & 2003 supp.). The relatively recent efforts of some lower courts to curtail the admiralty's traditional accommodation of special purpose vessels represents a sea change in the law. *DiGiovanni* and the floating work platform doctrine are symptomatic of this change.

B. Attempts to exclude special purpose vessels under the work platform doctrine have proven prolix and unpredictable.

The floating work platform doctrine rests on three "non-requisite criteria" and nine free-floating "factors," and purports to deny Jones Act vessel status to any watercraft that is not used *primarily* for transportation. *Ellender*, 909 F.2d at 806. The "non-requisite criteria" inquire whether the craft at issue was (a) constructed and used primarily as a work platform rather than for transporting people or things, (b) moored or otherwise secured at the time of the accident, and (c) capable of anything other than a "merely incidental" transportation function. *See Bernard, supra*, 741 at 831-832. The free floating factors ask if it had (1) navigational aids, (2) a raked bow, (3) lifeboats or other life-saving equipment, (4) bilge pumps, (5) crew quarters, (6) Coast Guard registration/, (7) the ability to float, (8) the ability to move, and (9) a recent history of movement. *Id*. These factors and criteria frame the very type of "detailed," self-executing tests that this Court eschewed in *Chandris*. 520 U.S. at 369. Just how the Fifth Circuit culled them from the countless, seamless features that centuries of art, technology and

tradition have built into the ever-evolving concept of a "vessel"[21] has never been adequately explained.

As we saw earlier, the work platform doctrine is generally thought to have been launched by *Cook v. Belden Concrete Products, Inc., supra*. *See Bernard,* 741 F.2d at 829. *Cook* involved a barge constructing platform, not unlike a building way, that was functionally identical to the floating dry dock this Court refused to term a "vessel" in *Cope v. Valette Dry Dock Co.,* 119 U.S. 625 (1887). In other words, the building way in *Cook* was merely "an extension of land." *See Manuel,* 135 F.3d at 350 (explaining *Cook*). There was thus nothing about the case that should have scuttled the Jones Act status of special purpose barges and dredges generally. As Judge Clark's opinion in *Cook* was careful to observe: "Conventional ships and barges as well as unconventional craft such as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." 472 F.2d at 1001 (numerous citations omitted).

Quite apart from its questionable provenance, the floating work platform doctrine is impractical and unwieldy. First of all, it turns on the abstract and often subjective[22] distinction between a watercraft's "primary"

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[21] The word "vessel" apparently comes to us from the Old French "*vaissel*" or "*vaisseau.*" John G. Rogers, *Origins of Sea Terms* (4th ed., Mystic Seaport Museum, 1985) 189.

[22] All too often, this involves inferring or devining the "intention of the owner." *See, e.g., Manuel,* 135 F.3d at 350.

and "incidental" purposes. But as one insightful district court observed:

> Not all floating structures which serve as work platforms are excluded from vessel status. Aircraft carriers, fishing boats, cable-laying boats, for example, are work platforms in a very real sense. Yet no one would dispute their status as vessels. What distinguishes these vessels from the work platforms in *Davis* [*v. Cargill*, 808 F.2d 361 (5th Cir. 1986) (following *Bernard*)] is that the former move people or equipment across water to the place where the work will be performed, while the latter are affixed close to the shoreline so that work may be brought to them.

Koernschild v. W.H. Streit, 834 F.Supp. 711, 717 (D.N.J. 1994) (holding that anchored "flexifloat" could be vessel). Because of the doctrine's self executing nature, however, only a few work platform cases seem to recognize this distinction. *See, e.g., Sharp v. Johnson Bros. Co.*, 917 F.2d 886 (5th Cir. 1990) (where Fifth Circuit reversed a summary dismissal entered under the work platform doctrine and held that a pile driving spud barge could be a vessel because it transported its crane and pile driving equipment to the construction site).

The multifaceted work platform test has also been criticized as "prolix," "arbitrary," and "extremely flabby." *See* Robertson, *The Law of Seaman Status Clarified*, 23 J.Mar.&Com. 1 (1992) at 14-15; 1 Schoenbaum, *supra*. That may be why the Fifth Circuit seized the opportunity to reconsider it in *Manuel v. P.A.W. Drilling Well Service,*

Inc., 135 F.3d at 347-51.[23] This reconsideration included the realization "that a vessel can serve the dual function of transporting cargo, equipment, or persons across navigable waters and acting as a work platform." *Id.* at 351. Congress must have recognized the same thing when it refused to speculate about a vessel's primary and incidental uses and defined the term to include "every description of water craft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). That definition is much easier to apply, and produces far more predictable results,[24] than the floating work platform doctrine.

C. Attempts to exclude special purpose watercraft under the "actual navigation test" articulated in *DiGiovanni* run afoul of *Chandris*.

While the actual transit test employed by *DiGiovanni* was extrapolated largely from the Fifth Circuit's decision

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[23] *See* footnote 17 *supra*.

[24] For an examination of the unpredictable results produced by the work platform doctrine, *see* The *Amicus Curiae* Brief of the Association of Trial Lawyers of America in Support of the Petition, § IV. That Brief cites the notoriously irreconcilable results in *Sharp, supra* (where the Fifth Circuit reversed a summary judgment and held that a pile driving spud barge could be a vessel) and *Ellender, supra* (where the same circuit affirmed a summary judgment and held that a pile driving spud barge could not be a vessel). It also compares *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d at 351 (noting that "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status") to *Hurst v. Pilings & Structures, Inc.*, 896 F.2d at 504 (holding that a spud barge was a work platform, and not a vessel, as a matter of law).

in *Bernard,* its lineage can also be traced back to *Cook*. As we saw, *Cook* was "governed by the proposition that, 'as a matter of law, a floating dry dock is not a vessel *when it is moored and in use as a dry dock.*'" 472 F.2d at 1002 (original emphasis) (citations omitted). The opinion nonetheless suggested that: "Although the floating construction platform was not designed for the purpose of navigation, the structure might be classified as a vessel subject to the liabilities arising from an allegedly unseaworthy condition, if at the time of appellant's injury it had actually been engaged in navigation." *Id. DiGiovanni* turned this suggestion into law.

DiGiovanni and the decision below hold that "if a barge, or other float's primary 'purpose is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit" *DiGiovanni,* 959 F.2d at 1123 (original emphasis); *Stewart I,* 230 F.3d at 467, *Pet. App. B,* 22. But that holding cannot be reconciled with this Court's opinions in *Chandris* or *Harbor Tug.*[25] Under those opinions, a plaintiff's Jones Act status must be determined, not from a fleeting "snapshot" of his duties at the

[25] Nor can they be squared with *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 371 (1957) (which upheld seaman status for an Illinois dredge hand injured in the service of "a stationary earth removing machine"); *Grubart v. Great Lakes Dredge & Dock,* 513 U.S. 527, 535 (1995) (where this Court observed that no one could "seriously dispute the conclusion of each court below" that a spud barge is a "vessel for maritime tort purposes" even "though the barge was fastened to the river bottom and was in use as a work platform at the times in question") and *Gizoni,* 502 U.S. at 83-84 (where this Court held that a shipyard worker could be a seaman even though he was injured aboard a floating work platform that was moored to a dry dock.)

moment of injury, but "'in the context of his entire employment' with his current employer." *Chandris,* 515 U.S. at 366; *Harbor Tug,* 520 U.S. at 558 (1997). The idea is "to avoid engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Chandris,* 515 U.S. at 363. By permitting special purpose watercraft to carry their crews in and out of seaman status every time they weigh or drop an anchor, *DiGiovanni* and the decision below varnished the Jones Act with just such a protean gloss.

This gloss evidently flowed from the First Circuit's desire to separate land-based workers from sea-based workers by means of a restrictive vessel definition. *See DiGiovanni,* 959 F.2d at 1122. Though the authors of the work platform doctrine never stated their intentions as clearly as the First Circuit did in *DiGiovanni,* they were probably inspired by the same goal. *Bernard,* 741 F.2d at 828-29. But that goal was mooted by this Court's *Chandris* decision.

III. *CHANDRIS* AND THE SUBSTANTIAL CONNECTION REQUIREMENT HAVE MOOTED THE NEED TO EXCLUDE SPECIAL PURPOSE VESSELS.

A. This Court restated the elements of seaman status in *Chandris.*

Chandris was decided in 1995, three years after *DiGiovanni* and more than a decade after *Bernard.* It restated the theretofore tangled jurisprudence of seaman status as follows:

> [T]he employment-related connection to a vessel in navigation necessary to qualify as a seaman under the Jones Act comprises two basic elements: The worker's duties must contribute to the function of the vessel or the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

515 U.S. at 376 (internal quotation marks and citation omitted). Lower courts have broken down these two basic elements still further:

> A seaman is any worker who faces "regular exposure to the perils of the sea." A worker faces regular exposure to the perils of the sea if (1) his duties contributed to the function of a vessel or to the accomplishment of its mission; (2) he has a connection to a vessel (or to an identifiable group of such vessels) that is substantial in duration; (3) he has a connection to a vessel (or to an identifiable group of such vessels) that is substantial in nature; and (4) the relevant vessel (or group of vessels) is in navigation.

Lorimer v. Great Lake Dredge & Dock Co., 2002 U.S.App.LEXIS 10775, p. 3 (9th Cir. 2002) (citations omitted) (unpublished); *see also Gault v. Modern Continental/Roadway Constr. Co.*, 100 Cal.App.4th at 998-99. Each of those four elements helps to define the term "seaman."

B. Some of the elements restated in *Chandris* were designed to be inclusive.

The Jones Act has always been "entitled to a liberal construction to accomplish its beneficent purposes."

Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949). Some of the elements of seaman status were therefore designed to be expansive. Element number (1), for example, the requirement that a seaman's duties "contribute to the function" of his or her vessel, "is very broad," *Chandris*, 515 U.S. at 368, and extends Jones Act coverage to anyone who perform ship's work. *Wilander*, 498 U.S. at 354-55. Element number (4), the requirement that the relevant vessel or group of vessels be "in navigation," is also very expansive and reaches any seaman who serves aboard any operating watercraft even when "'she is not voyaging, but is at anchor, berthed or dockside.'" *Chandris*, 515 U.S. at 373.[26] The only requirement that was designed to be restrictive is the so-called "substantial connection requirement" set forth in elements (2) and (3).

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[26] The phrase "in navigation" is thus "used in its broad sense and is not confined strictly to the actual navigating or movement of the vessel." *Johnson*, 742 F.2d at 1063; *see generally* Edwin J. Bull, *Seaman Status Revisited: A Practical Guide to Status Determination*, 6 U.S.F.Mar.L.J. 547, 582-84 (1994). A vessel is "in navigation if it is engaged in its expected duties on navigable waters." *Leonard v. Transoceanic Sedco Forex*, 189 F.Supp.2d 627, 629 (S.D. Tx. 2002). The distinction is between a "dead ship" and an operational one. *See Chandris*, 515 U.S. at 372-76. While a ship in mothballs is "out of navigation" even when it's being towed across the Atlantic, *see West v. United States*, 361 U.S. 118, 123-24 (1959), and an unfinished ship has not yet "entered navigation" even though it has already voyaged from New Orleans to Tacoma, *see McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 568 (9th Cir. 1992), an operating vessel with a crew aboard remains "in navigation" even when it is sitting in dry dock. *See, Chandris*, 515 U.S. 347; *Cook*, 472 F.2d at 1001-02; *see also* David W. Robertson, *Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era*, 24 Rutgers L.J. 443, 464 (1993), John R. Hillsman, *supra*, 15 U.S.F.Mar.L.J. at 66-70.

C. The principal restrictions on seaman status were restated in *Chandris* as the substantial connection requirement.

"The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and whose employment does not regularly expose them to the perils of the sea." *Chandris, supra,* 515 U.S. at 368. There are two elements to this requirement; the first is temporal: "A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." *Id.* at 371. According to one well settled rule of thumb: "A worker who spends less than 30 percent of his time in the service of a vessel should not qualify as a seaman under the Jones Act." *Id.* at 371.

The other element focuses on the job-related hazards that a putative seaman faces. As this Court put it *obiter dicta* in *Harbor Tug,* "the inquiry into the nature of the employee's connection must concentrate on whether the employee's duties take him to sea." 520 U.S. at 555. But that *dictum* should not be taken literally; "read in context" it is just "a shorthand way of saying that the employee's connection to the vessel regularly exposes him 'to the perils of the sea.'" *Endeavor Marine v. Crane Operators, Inc.*, 234 F.3d 287, 292 (5th Cir. 2000) (holding that a crane operator serving aboard a barge in the Port of New Orleans was a seaman as a matter of law). A worker does not have to breast ocean swells to face those perils. *See*

Harbor Tug, 520 U.S. at 558-59 (referring to the work of a deckhand on harbor tugs and ferry boats as "seagoing activity" and stating that such work subjects the worker to "the perils of the sea"). This Court has always afforded seaman status to workers who serve on inland waters.[27] As a seminal commentary by Professor David Robertson[28] explained, the Jones Act was designed to protect anyone who regularly encounters the characteristic perils of a seaman's work environment aboard an operating vessel, "even though it may be within sight and hailing distance of land." David W. Robertson, *A New Approach to Determining Seaman Status,* 64 Tex.L.Rev. 79, 80 (1985) *cited in Wilander,* 498 U.S. at 354.[29]

The lower courts should thus be using the elements of the substantial connection requirement, and not the definition of the term "vessel," to separate those sea-based

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[27] *Gizoni*, 502 U.S. at 83-84 (plaintiff injured on work platform in San Diego Harbor); *Senko*, 352 U.S. at 371-72 (plaintiff injured on levee in Illinois); *Norton*, 321 U.S. at 571 (plaintiff injured on harbor barge in Port of Baltimore); *O'Donnell*, 318 U.S. at 39 (plaintiff injured on shores of Lake Michigan). *Cf. Chandris*, 515 U.S. at 355 (characterizing work on an Ohio River towboat as "life upon the sea") (*quoting Warner v. Goltra*, 293 U.S. 155, 157 (1934)).

[28] Professor Robertson is also the author of Petitioner's Brief on the Merits herein.

[29] That article identifies the characteristic perils faced by seamen as "the full range of dangers associated with deep water, wind and weather, tide and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor" as well as the full panoply of "risks attending the movement of vessels on navigable water." 64 Tex.L.Rev. at 80-81. *See also* David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases,* 34 J. Mar. L. & Com. 547, 570 & n. 140 (2003).

maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel. *Chandris, supra,* 515 U.S. at 368. The threshold vessel status inquiries posed by *DiGiovanni* and the work platform cases are not only unwieldy, they are unnecessary and irrelevant. When all is said and done, myopic definitions banning special purpose watercraft from vessel status do not predictably advance the process by which those who do not regularly face seaman's perils are winnowed out of Jones Act coverage. To the contrary, as Judge Wisdom recognized, the workers who serve aboard special purpose watercraft may be even more exposed to those peculiar hazards than the sailors who man more traditional ships. *Offshore*, 266 F.2d at 780 (observing that because offshore oil workers "run the risk of top-heavy drilling barges collapsing" they "are exposed to more hazards than are blue-water sailors").

These heightened hazards are by no means limited to offshore drill rig workers. Commercial divers, who work almost exclusively aboard special purpose barges, and who are strictly prohibited from diving off moving vessels by the Coast Guard "liveboat" regulations, 46 C.F.R. § 197.436(c)(3), are literally and continuously immersed in the perils of the sea. *See, e.g., Wallace v. Oceaneering International*, 727 F.2d 427, 435 (5th Cir. 1984) ("It is the inherently maritime nature of the tasks performed and perils faced by this profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes [a diver] a seaman."); *Webster v. Seahorse Fleet, Inc.*, 637 F.Supp. 151, 153 (W.D.La. 1986) (commercial divers are "continuously subject to the perils of the sea like blue-water seamen if

not more so").[30] Another obvious example is furnished by the hands who served aboard the Nantucket lightship. The primary mission of that special purpose watercraft was not the transportation of cargo, equipment or passengers; it was to provide a fixed beacon for mariners. As a consequence, the lightship made nothing but short, infrequent voyages, and lay at anchor for most of its long career. But the tenders who kept its beacon lit faced all the characteristic perils of a seaman's work environment – especially the risks of collision and allision. Transatlantic liners, beginning or ending their voyages in the coastal waters off Massachusetts, routinely homed-in on the lightship's signature radio beam to guide themselves through the fog. One morning in May, 1934, *R.M.S. Olympic* (*Titanic's* sister) steamed out of the murk, sliced the anchored lightship in two and killed seven of its crew members. *See* John Maxton-Graham, *The Only Way to Cross* (Macmillan Co., 1972) 307. The remorseless rule in *DiGiovanni* would have automatically barred the victims' craft from vessel status, but the UBCJA respectfully submits that the light tenders involved in that allision were clearly seamen. So was Petitioner Stewart when he was injured in the allision aboard the *Super Scoop*.

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[30] *See gen.* John R. Hillsman, *Have All the Recent Twists and Turns in the Jones Act Left Deep Sec Divers High and Dry?*, 11 U.S.F.Mar.L.J. 47 (1998-99).

IV. SINCE THERE IS NOTHING ABOUT 33 U.S.C. § 902(3)(G) INDICATING THAT IT DOES NOT USE THE WORD "VESSEL" TO INCLUDE EVERY DESCRIPTION OF WATERCRAFT USED, OR CAPABLE OF BEING USED AS A MEANS OF TRANSPORTATION ON WATER, THE PROPER LEGAL STANDARD FOR DETERMINING THE STATUS OF SPECIAL PURPOSE WATERCRAFT UNDER THAT STATUTE IS 1 U.S.C. § 3.

The statutory rules of construction must be used "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[.]" 1 U.S.C. § 1. Under those rules: "The term 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. As Petitioner points out, at least nineteen other federal statutes either incorporate that definition by reference or essentially reiterate it on their face.[31] At risk of belaboring the point, this Court has already used it to construe the crew member exclusion set forth in § 902(3)(G) of the LHWCA. *Norton,* 321 U.S. at 571 n. 4. So, in effect, have the lower courts in the Third, Fourth, Seventh and Ninth Circuits.[32]

The Ninth Circuit is the leader in this regard. Although "[t]here is no generalized test in the Ninth Circuit for determining whether a craft is a vessel in navigation" *see Martinez,* 303 F.3d at 1136-37, & n. 2, that court only denies vessel status to special purpose watercraft if they

[31] *See* Petitioner's Brief on the Merits, footnote 6 and accompanying text.

[32] *See* footnote 12 *supra* and accompanying text.

"are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate." *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992). These cumulative criteria may be redundant, and stated in the negative, but they are perfectly consistent with 1 U.S.C. § 3. They also accept "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Gizoni II*, 56 F.3d at 1140, n. 1 (floating work platform); *see also Estate of Wenzel v. Seaward Marine Service, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983) (submerged cleaning and maintenance platform). It has thus been suggested that: "There is no significant difference between the statutory definition of the term vessel [in 1 U.S.C. § 3] and the meaning attributed to it by the general maritime law as obtaining in this country." Steven F. Friedell, *supra*.

Since "[m]aritime tort law is dominated by statute," *Miles*, 498 U.S. at 36, and since the Jones Act is the "[f]oremost" enactment in the field of maritime torts, *American Dredging Co. v. Miller,* 510 U.S. 443 (1993), the UBCJA respectfully submits that 1 U.S.C. § 3 supplies the best legal standard for determining the vessel status of special purpose watercraft.

CONCLUSION

WHEREFORE, the UBCJA respectfully joins the Petitioner in asking the Court to complete its restatement of the essential elements for Jones Act standing by reversing the decision below and identifying 1 U.S.C. § 3 as the

legal standard for determining special purpose vessel status.

Respectfully submitted,

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APPENDIX A

CHRONOLOGICAL TABLE OF PUBLISHED DECISIONS HOLDING OR ASSUMING THAT A DREDGE IS A VESSEL.

Supreme Court Decisions

1. *The Virginia Ehrman*, 97 U.S. 309 (1877) (*allision case* – repeatedly referring to a dredge as a "ship" (*id.* at 310), a "vessel at anchor" (*id.* at 315), and a "vessel" (*id.* at 315, 316), and holding that a tug and the ship it was towing were both liable for allision damages to the owners of the anchored dredge).

2. *Ellis v. United States*, 206 U.S. 246 (1907) (*criminal case* – reversing dredge owners misdemeanor convictions for violation of a federal wage and hour statute on the ground that their employees were seamen and vessel crew members excluded from the act, holding that "the floating dredges were vessels" (*id.* at 259), and citing Rev. Stat. (1873) § 3 (now codified as 1 U.S.C. § 3).)

3. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943) (*unemployment insurance tax case* – holding that State of New York could collect unemployment insurance taxes from the employer of an assistant cook on a dredge, indicating that a dredge is a vessel (*id.* at 308 & n. 3) and citing Internal Revenue Service Cumulative Bulletin 1937-1, p. 408, which states that "dredges used for navigation and transportation in carrying on the work of deepening and removing obstructions from channels and harbors are vessels within the meaning of . . . the Social Security Act.")

4. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (*Jones Act case* – affirming a state court seaman's award to a handyman assigned to a dredge that lay moored alongside a levee in Illinois throughout

the plaintiff's employment, and which the Court described as "a stationary earth removing machine" (*id.* at 371), because: "No question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of petitioner's injury." *Id.* at 371 n. 16.)[1]

Lower Court Decisions

5. *The Alabama*, 22 F. 449 (C.C.S.D.Ala. 1884) (*maritime lien case* – upholding admiralty jurisdiction over a dredge hand's wage lien *in rem* for unpaid wages against a dredge and two scows, stating a maritime lien for unpaid wages, stating that a dredge is probably a vessel and holding that a dredge and its scows taken "as one craft or thing" clearly constitute a vessel.)

6. *The Pioneer*, 30 F. 206 (E.D.N.Y. 1886) (*maritime lien case* – Relying on *The Alabama* (just above), awarding damages on a supplier's libel *in rem* against a dredge, citing the statute now codified as 1 U.S.C. § 3, and holding that a dredge is a vessel because it "is an artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* at 207.)

7. *The City of Alexandria*, 31 F. 427 (S.D.N.Y. 1887) (*collision case* – holding that a steamship, a tug, and the dredge it was towing were all at fault for a collision that occurred partly because the dredge had not discharged its obligations as a "vessel" under tow.)

[1] Three members of the Court dissented on the ground – later disapproved by *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) – that Jones Act seaman status requires the worker to aid in navigation. Even the dissenters, however, "assumed that this dredge may properly be regarded as a 'vessel.'" 352 U.S. at 375 n. 1.

8. *The Commodore*, 40 F. 258 (E.D.Va. 1887) (*libel in rem* – holding that an anchored dredge could be held liable *in rem*, for the negligence of its master, just like any other vessel.)

9. *The Endless Chain Dredge*, 40 F. 253 (E.D.Va. 1889) (*maritime lien case* – holding that a dredge could be held liable *in rem* for the maritime liens of suppliers and repairers, referring to the "vessel" (*id.* at 254), and stating that: "As to the question whether a steam-dredge, which is a floating scow fitted with steam appliances, bucket, and scoop, for deepening channels of navigation and like purposes, is a subject of admiralty jurisdiction, there have been repeated decisions in the United States and Great Britain in the affirmative." *Id.* (citations omitted).)

10. *Seabrook v. Raft of Railroad Cross-Ties*, 40 F. 596 (D.S.C. 1889) (*allision case* – awarding damages to the owner of an anchored dredge that was run down by a raft made of railroad crossties (as a way of bringing them to market), taking the vessel status of the dredge for granted (*id.* at 597), and holding that the raft was a vessel because it satisfied the rule of construction that is codified as 1 U.S.C. § 3. *Id.* at 598.)

11. *McNamara v. The Atlantic*, 53 F. 607 (D.S.C. 1893) (*maritime lien case* – upholding a dredge engineer's maritime lien for unpaid wages, and stating that: "Dredges and scows are subject to a maritime lien for services rendered. *The Alabama*, 19 F. 544." *Id.* at 608.)

12. *The Starbuck*, 61 F. 502 (E.D.Pa. 1894) (*maritime lien case* – upholding dredge crew's maritime lien for unpaid wages, and stating that: "That a dredge and her scows are to be treated as one concern, and are subject to the admiralty jurisdiction, has been several

times decided, and I think rightly. To discuss the subject would be a waste of time." *Id.* at 502 (citations omitted).)

13. *Saylor v. Taylor*, 77 F. 476 (CA4 1896) (*maritime lien case* – granting primacy to a dredge crew's maritime lien for wages on the ground that all "those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners" (*id.* at 479), and holding that a dredge was a vessel under the definition that is now codified as 1 U.S.C. § 3.)

14. *The International*, 83 F. 840 (E.D.Pa. 1897), *aff'd*, 89 F. 484 (CA3 1898) (*customs case* – holding that the Collector of Customs could not seize a foreign built dredge under a tariff act because vessels could not be seized under that act, and because "Dredges transport their crews, coal, and other supplies, and are 'capable' of being used to transport other things" and are therefore "vessels" within the meaning of the rule of construction that is now codified as 1 U.S.C. § 3 *excluded* dredges (83 F. at 841).)

15. *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D.Wash. 1898) (*maritime lien case* – upholding dredge crew's maritime lien for unpaid wages and concluding that their dredge was a vessel.)

16. *Steam Dredge No. 1*, 87 F. 760 (D.N.J. 1898) (*maritime lien case* – holding that a dredge foreman could assert a maritime lien for unpaid wages, and taking it as settled law that dredges are vessels.)

17. *McMaster v. One Dredge*, 95 F. 832 (D.Ore. 1899) (*maritime lien case* – holding that a maritime lien against a newly completed dredge was invalid because the underlying claim was for construction

rather than repairs, but suggesting that, once it had entered navigation, the dredge would be a vessel "because she was constructed so as to move from place to place upon navigable waters" *Id.* at 833.)

18. *Bowers Hydraulic Dredge Co. v. Federal Contracting Co.*, 148 F. 290 (S.D.N.Y. 1906), *aff'd*, 153 F. 870 (CA2 1907) (*contract case* – upholding admiralty jurisdiction over contract dispute arising from a dredge charter, and rejecting the defendant's argument that the landfill work the dredge had been contracted to perform was non-maritime, because, "artificial distinctions [arising] out of the work of a dredge being performed partly on land and for the purpose of a land transaction should not oust the court of jurisdiction of a floating structure when its ordinary purpose is distinctly maritime." *Id.* at 294.)

19. *North American Dredging Co. v. Pacific Mail S.S. Co.*, 185 F. 698 (CA9 1911) (*liable in rem* – Upholding damage claim brought by the owner of a steamship against the dredge whose anchor chain had fouled the steamship's propeller, and treating the dredge as a vessel because: "A floating dredger capable of carrying her own machinery and implements and working crew, when employed as an aid to commerce in deepening navigable channels and harbors, is subject to the maritime law and to a maritime lien for a tortious injury to *another vessel* caused by negligence of those controlling her operations." *Id.* at 702 (emphasis added) citations omitted).)

20. *Richmond Dredging Co. v. Standard American Dredging Co.*, 208 F. 862 (CA9 1913) (*liable in rem* – holding that a dredge could be libeled *in rem* by an owner seeking its return from a charterer who was allegedly wrongfully retaining possession, and stating that *North American* [just above] definitively established that a floating dredge is a vessel. *Id.* at 866.)

21. *The Steam Dredge* A, 204 F. 262 (CA4 1913) (*maritime lien case* – upholding and re-ranking the maritime liens of various creditors, and treating a dredge, without comment, as a vessel.)

22. *The Dredge A*, 217 F. 617 (E.D.N.C. 1914) (*maritime lien* – accepting the case on remand from the decision just above, and stating "that Dredge A, after it was completed, was a vessel, and within the admiralty jurisdiction." *Id.* at 623-24 (citations omitted).)

23. *The Steam Dredge No. 6*, 222 F. 576 (S.D.N.Y. 1915), *aff'd*, 241 F. 69 (CA2 1917) (*limitation case* – accepting jurisdiction over a dredge owner's petition for relief under the Vessel Owners Limitation of Liability Act (now 46 U.S.C. app. § 183 et. seq.), which protects only "the owner of any vessel," and concluding that the defendant's arguments against the dredge's vessel status "are unsound, and do not require special attention." *Id.* at 580.)

24. *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.*, 256 F. 497 (CA1 1919) (*limitation case* – upholding jurisdiction over a "drill boat" owner's petition for relief under the Vessel Owners Limitation of Liability Act, (*supra*), and stating that the statute that is now 1 U.S.C. § 3 supported jurisdiction because: "Drillboat No. 4 was a navigable structure having a permanent cargo, viz., its engines, boilers, drilling machinery, etc., which it transported from place to place for the purpose of removing ledges in navigable water and as an aid to commerce and navigation. It was not a floating dry dock intended to be permanently moored . . . , but was intended and used for the transportation of a

cargo which it carried from place to place to remove ledges." *Id.* at 501.)[2]

25. *Zurich General Acc. & Liab. Ins. Co. v. Industrial Acc. Comm'n*, 191 Cal. 770, 218 P. 563 (1923) (*workers' compensation case* – holding that a dredge hand killed in the course of his employment was a seaman, and therefore excluded from state workers' compensation benefits, because: "The dredger in this case, being engaged in deepening navigable waters, was a 'vessel' within the meaning of title 1, section 3 of the Revised Statutes of the United States [now codified as 1 U.S.C. § 3]." 218 P. at 567 (citations omitted).)

26. *The Hurricane*, 2 F.2d 70 (E.D.Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925) (*maritime lien case* – upholding a maritime lien for the unpaid wages of the crew of the dredge *Hurricane*, and holding that "the *Hurricane*, being engaged in the work of deepening channels in navigable water, an occupation incident to navigation, is a vessel . . . ." 2 F.2d at 72.)

27. *Butler v. Ellis*, 45 F.2d 951 (CA4 1930) (*bankruptcy case* – upholding the priority of a dredge crew's claim for wages because: "The rule that dredges engaged in work in furtherance of navigation are vessels within the meaning of the maritime law, and as such are subject to maritime liens for wages and supplies furnished, is sustained by the overwhelming weight of authority." *Id.* at 955 (citations omitted).)

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[2] Judge Anderson dissented on the vessel-status point. He seemed to acknowledge 1 U.S.C. § 3 as the controlling statute, but he asserted that the drill boat was not "means of transportation" because it did most of its work standing still. *Id.* at 505.

28. *Warren & Arthur Smadbeck, Inc. v. Heling Contracting Corp.*, 50 F.2d 99 (CA2 1931) (*fire damage case* – accepting admiralty jurisdiction over a dispute between the owner and the charterer of a dredge that arose from destruction of the dredge by fire, and citing *Bowers*, *supra*, for the proposition that a floating dredge remains a vessel (and a contract for its hire remains maritime) whether it was doing landfill work or channel-deepening work.)

29. *Whalen v. Twin City Barge and Gravel Co.*, 280 Ill.App. 596, 1935 WL 348 (1935) (*Jones Act case* – upholding an award of Jones Act damages to a dredge hand because: "The defendant was the owner and possessor of a dredge boat and it was afloat on navigable waters of the United States and the plaintiff was in its employ and suffered personal injury in the course of his employment. He was a seaman within the meaning of the [Jones] act. . . ." 1935 WL 348 at * 8.)

30. *Kibadeaux v. Standard Dredging Co.*, 81 F.2d 670 (CA5 1936) (*Jones Act case* – holding that a dredge hand could be a seaman and citing 1 U.S.C. § 3 in support of characterizing the dredge as a vessel. *Id.* at 673.)

31. *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (CA5 1938) (*LHWCA case* – excluding a drowned dredge worker from LHWCA compensation because he was a "member of a crew" under the statutory provisions now codified as 33 U.S.C. § 902(3)(G), and concluding that his dredge was a "vessel" under 1 U.S.C. § 3.)

32. *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F.2d 608 (D.C.Cir. 1942) (*Jones Act case* – assuming that a dredge was a vessel but holding that an injured dredge worker was not entitled to proceed under the Jones Act because he was not aboard primarily to aid

in navigation – a view later disapproved by this Court in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).)

33. *Bolan v. Bay State Dredging & Contracting Co.*, 48 F.Supp. 266 (D.Mass. 1942) (*Fair Labor Standards Act case* – holding that a dredge hand was "employed as a seaman", and therefore excluded from The Fair Labor Standards Act by 29 U.S.C. § 213(b)(6), because: "The dredge here was a vessel and in navigation." 48 F.Supp. at 269 (citations omitted).)

34. *Melanson v. Bay State Dredging & Contracting Co.*, 62 F.Supp. 482 (D.Mass. 1943) (*Jones Act case* – upholding an injured dredge worker's right to proceed under the Jones Act, and taking the Supreme Court's decision in *Ellis v. United States*, *supra*, as conclusively establishing that "floating dredges [are] vessels." *Id.* at 483 (quoting *Ellis*, 206 U.S. at 259).)

35. *Brown v. L.A. Wells Const. Co.*, 143 Ohio St. 580, 56 N.E.2d 451 (1944) (*Jones Act case* – holding that a dredge hand was a seaman and citing 1 U.S.C. § 3 to support its conclusion that his dredge was a vessel. 56 N.E.2d at 454.)

36. *Pariser v. City of New York*, 146 F.2d 431 (CA2 1945) (*Jones Act case* – upholding a damage award to a dredge hand and stating that the employer's contention that the injured worker was not a Jones Act seaman was "wholly without merit." *Id.* at 433.)

37. *Walling v. Bay State Dredging & Contracting Co.*, 149 F.2d 346 (CA1 1945) (*Fair Labor Standards Act case* – disagreeing with *Bolan*, *supra*, and holding that dredge hands are not excluded from the benefits of the Fair Labor Standards Act, but quoting *Butler v. Ellis*, *supra*, for the proposition that dredges were vessels. *Id.* at 351.)

38. *Walling v. Great Lakes Dredge & Dock Co.*, 149 F.2d 9 (CA7 1945) (*Fair Labor Standards Act case* – concluding, on grounds of liberal construction, *id.* at 10, that dredge hands are not excluded from the benefits of the Fair Labor Standards Act, but acknowledging that dredges are vessels, and that dredge hands are seaman for most purposes.

39. *Walling v. W.D. Haden Co.*, 153 F.2d 196 (CA5 1946) (*Fair Labor Standards Act* – agreeing with the two decisions just above, holding that dredge workers are not excluded from the benefits of the Fair Labor Standards Act, but acknowledging that dredges are vessels and dredge workers seamen for most purposes, including the Jones Act, because "a dredge boat operating in navigable waters is a vessel subject to the admiralty jurisdiction, required to show the lights and give the signals due by vessels; and the men working on it are in the general sense seamen entitled to enforce liens against it for wages and injuries." *Id.* at 198.)

40. *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (CA1 1948) (*Jones Act case* – upholding a Jones Act award to a dredge hand was injured while pumping silt and sand from the bottom of Boston Harbor to provide landfill material for Logan Airport on the ground that: "It is not disputed that *Dredge No. 5* is a vessel within the meaning of the statutory definition of vessel, as including 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' Rev. Stat. 1875, Sec.3, 1 U.S.C. § 3." 165 F.2d at 305.)

41. *In re Arundel Corp.*, 273 A.D. 399, 78 N.Y.S.2d 270 (1948) (*unemployment compensation case* – holding that dredge hands did not fall within language excluding seamen from the state unemployment compensation law, but noting that "[d]redges have been

construed as 'vessels' and dredge men considered 'seamen' [so as to be entitled to] maritime liens for wages * * * [and] recover[y] for personal injuries under the Jones Act." 78 N.Y.S.2d at 273-74 (citations omitted).)

42. *Early v. American Dredging Co.*, 101 F.Supp. 393 (E.D.Pa. 1951) (*Jones Act case* – awarding Jones Act damages to a dredge hand and stating: "There can be no doubt that the dredge is a vessel. 'Vessel' is defined in 1 U.S.C. § 3 to include 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' A dredge is a vessel . . . , even when it has no motive power of its own, since it is a means of transportation on water. Cf. *Norton v. Warner Co.*, 321 U.S. 565 [1944]." *Id.* at 395.)

43. *Covington v. Standard Dredging Corp.*, 61 So.2d 644 (Fla. 1952) (*Jones Act case* – holding that a dredge hand hurt while engaged in landfill work was not entitled to proceed under the Jones Act on the theory, later rejected in *Wilander, supra,* that his duties were not in aid of navigation, but clearly treating his dredge as a vessel.)

44. *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (CA6 1953) (*Jones Act case* – upholding the Jones Act claims of dredge hands killed during a sand and gravel mining operation on the Mississippi River and repeatedly referring to their dredge as a vessel. *Id.* at 388.)

45. *McKie v. Diamond Marine Co.*, 204 F.2d 132 (CA5 1953) (*Jones Act case* – upholding the right of an injured dredge hand to proceed under the Jones Act, and repeatedly referring to his dredge as a vessel. *Id.* at 134, 136.)

46. *Chesser v. General Dredging Co.*, 150 F.Supp. 592 (S.D.Fla. 1957) (*maintenance and cure* – awarding maintenance and cure to a dredge hand and stating: "It is well settled that a dredge employed in navigable waters is a vessel under the Maritime Law . . . ." *Id.* at 595 (citations omitted). In dictum, the Court disparaged the view that dredges engaged in landfill work should not be regarded as falling under maritime law. *Id.*)

47. *Brannan v. Great Lakes Dredge & Dock Co.*, 253 Minn. 28, 91 N.W.2d 166 (1958) (*Jones Act case* – reversing a directed verdict that a dredge undergoing extensive repairs was not fit for service, holding that the dredge was a vessel as a matter of law, and remanding the case on the ground that the issue of whether the dredge was "in navigation" at the time of the injury was a jury question. 91 N.W.2d at 175-76.)

48. *Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (CA2 1960) (*Jones Act case* – upholding an award of Jones Act damages to the widow of a drowned dredge deckhand in a case where the defendant did not contest the dredge's vessel status or the worker's seaman status.)

49. *Tyndall v. Conduit and Foundation Corp.*, 269 F.2d 947 (CA3 1959) (*Jones Act case* – affirming Jones Act award to an injured dredge hand and stating that if the worker in *Butler v. Whiteman*, 356 U.S. 271 (1958), was a seaman, then the instant worker was bound to be one as well. *Id.* at 949.)

50. *Arundel Corp. v. Jasper*, 219 Md. 519, 150 A.2d 415 (1959) (*Jones Act case* – affirming award of Jones Act damages and relying on *Senko v. LaCrosse Dredging Corp.*, *supra*.

51. *Lawrence v. Norfolk Dredging Co.*, 319 F.2d 805 (CA4 1963) (*Jones Act case* – upholding award of Jones Act damages to an injured dredge hand and noting that the defendant had conceded the dredge's vessel status during oral argument. *Id.* at 807.)

52. *Brinegar v. San Ore Constr. Co.*, 302 F.Supp. 630 (E.D.Ark. 1969) (*Jones Act case* – holding that an injured dredge hand was a seaman as a matter of law, and stating that "under a long train of court decisions the [dredge] *Mud Hen* is . . . a vessel" (*id.* at 638) and that in view of 1 U.S.C. § 3, "the defendant here can hardly claim that the dredge *Mud Hen* was not a vessel" (*id.* at 639) (citations omitted).

53. *Toland v. Atlantic Gahagan Joint Venture Dredge No. 1*, 109 N.J.Super. 186, 262 A.2d 886, *aff'd*, 57 N.J. 205, 271 A.2d 2 (1970) (*Jones Act case* – upholding an injured dredge hand's right to proceed under the Jones Act, and stating that "employees working aboard dredges on navigable waters are members of a crew of a 'vessel' and are entitled to a cause of action under the Jones Act and maritime law." 262 A.2d at 889 (citations omitted).)

54. *Potashnick-Badgett Dredging Inc. v. Whitfield*, 269 So.2d 36 (Fla.App. 1972) (*Jones Act case* – holding that a dredge was a vessel and a dredge hand a seaman as a matter of law because: "It is clear that a dredge may, in appropriate circumstances, be held to fulfill the first requirement [for seaman status], that of being a vessel. It is likewise clear that in order to be considered to be 'in navigation' a vessel need not be in motion at the time in question, as long as it is performing its particular function in waters that are navigable." *Id.* at 41 (citations omitted).)

55. *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D. Haw. 1982) (*Jones Act case* – holding that a dredge engineer engaged in landfill operations was a seaman as a matter of law, and stating that: "A review of the authorities very quickly makes it clear that a dredge such as the one in the instant case is a 'vessel' within the meaning of the Jones Act." *Id.* at 663-64 (citations omitted).

56. *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (CA9 1989) (*Jones Act case* – holding that Jones Act did not apply to injuries incurred on a dredge that was operating on non-navigable water but repeatedly referring to said dredge as a vessel.)

57. *O'Bryan v. Folk Constr. Co.*, 594 So.2d 900 (La.App. 1991) (*Jones Act case* – upholding a Jones Act award to a dredge hand, and assuming that a floating dredge doing landfill work is a Jones Act vessel.)

58. *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (CA3 1994) (*Jones Act case* – holding that the Jones Act does not apply to injuries on a dredge that is operating on non-navigable water but noting that the defendant had conceded the dredge was a vessel. *Id.* at 1251.)